1932

Comparative Law Bibliography

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Comparative Law

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9. De Cossio - Los Derechos sucesorios del Conyuge sobreviviente Rev. Der. Pri. T. XLI P. 131

10.- J. Puig Brutau. El lenguaje del Derecho. Rev. Der. Pri. T. 1952 P. 977

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2. K. H. Nadelmann, El Derecho Internacional Privado norteamericano de la Quiebra. Rev. de Der. (Univer. de Concepción, Chile) Año XXI, No. 84, p. 187 (Abr-Jun. 1953).
3. J. Vallet de Goytisolo. Conflictos de leyes en materia de Regímenes matrimoniales y Sucesorios. Rev. de Der. y C. Soc. (Univ. de Concepcion, Chile) Año XXXIII, No. 133 p. 3 y No. 134 p. 3 (Oct.-Dic. 1965)

Inheritance

1. The words 'inheritance', 'heir'.

Although the word inheritance has the same Latin root as the Italian eredità the French Héritage and the Spanish herencia, the concept as that of the heir is different.

It could be said in a general way that an heir according to the common law is the person on whom the real property of the deceased devolves by operation of law if the deceased (decedent) dies intestate.

2. Two basic concepts of Inheritance.

In the history of law two basic and opposite concepts of inheritance prevail. The Roman and the Germanic.

According to the Germanic inheritance is composed of the things left by the decedent. It is a simpler and less sophisticated concept like the Roman.

3. Roman Concept of Inheritance

In the Roman concept the inheritance is an abstract or ideal entity which is not only formed by the assets left by

the deceased or decujus but also by the liabilities or obligations.

This Roman concept has been accepted by the continental law i.e. France Italy, Spain, Germany, Latin America, etc.

It could also be said that the basic principles of Roman law in inheritance such as universal succession, forced heirship, representation and prohibition of the trust concept have been retained in the modern civil law. with its consequences - ex universitatem and ultra vires

4 Civil Law Concept

Inheritance according to the civil law is the succession in most of the rights of the deceased and most of his obligations. It could be generally stated that all the rights that have an economic value which are not extinguished by death are transferable by the inheritance to the successor.

Among these rights which are not transferable or inalienable are: usufruct, use and occupancy, the action of revocation of a donation because of ingratitude (at 653 Civil Code) and of course the political rights.

Therefore, when we read in the American Corpus Juris backed by some decisions such as Adams v. Akerlund, 168 Ill. 632, 48 NE 454, 457, (C.J. t. 31 p. 1199) that in Civil Law "Inheritance is the succession to all the rights of deceased we know it is not completely right.

Black's Law Dictionary 3rd. Edt. p. 963 referring to inheritance in the civil law states: "The succession of the heir to all the rights and property of the estate-leaver.

This expression rather unused in English is very interesting because it takes us by the hand to that which the essence of the civil law inheritance - the concept of patrimony.

5. Patrimony

In a strict juridical sense patrimony (estate) is the aggregate (conjunto) of the juridical relations of a person susceptible of an economic value.

According to the classical concept patrimony is an emanation of a person which

1. Is inalienable
2. Everyone has it
3. No one can have more than one.

The corollaries to these concepts:

1. Assets and liabilities.
2. Potential capacity
3. It remains with the individual until his death.

6. Origin of this subtle concept

The theory more accepted and logical is that this concept was a consequence of the original political conception of the Roman family. At the death of the Chief - Pater Familias - another one comes into the leadership

7. Types of Inheritance

Testate - By will
Abintestate. - By law
Contractual - By Contract - Germany and Switzerland

8 Abintestate.

Both American and French law only call heir the successor abintestato. If it is by a will the American call it legatee if it relates to personal property and devisee if real estate.

In French legatee universell if it is an heir by will and legatee particulier if it is a legatee

9. Systems to regulate the Intestate Inheritance
Subjectives or personal - Based on family relation
Objectives based on the origin of the res.

10. The French, Italian and Spanish
Belong to the subjectives and are based on the proximity of the grade of relationship, different degrees the stirps or line and the principle of representation.

11. Orders of Succession
Descendants
Ascendant relations
Collaterals.

12. Classes of Successors.
Legitimate relations - Jus familiae
Natural relations " sanguinis
Spouse " matrimonium
State " imperi

13. The abintestate inheritance is called: takes place
Art. 912 of the Civil Code
Besides the provision of the article
a. When the testamentary clause is null
b. Incapacity to make a will
c. Resolutory condition

14. Relationship

Is stablished taking into account the degrees and lines.

According to art. 915 the nearness of relationship is determined by the number of generations. Each generation forms a degree.

The line is formed by degrees.

Art. 918 determines the relationship

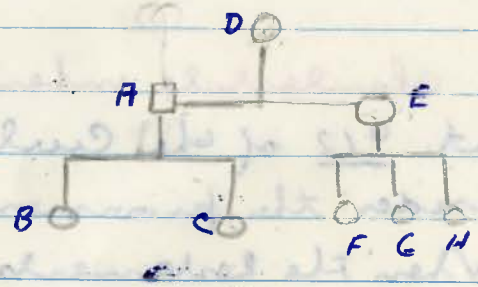
15 Priorities in Succession

Those in degrees closer to the decujus exclude those further worth the exception of the right of representation

The descending line has preference over the ascendant line.

The ascendants ~~line~~ inherit by liner that is the mother and father

The natural child legally recognized or such



16. Right of Representation

One can inherit by his own right (jure propio) or by representation (jus representationis)

By his own right - Jure propio

1. When called alone to the inheritance
2. " many are called but are all descendants of the same immediate ascendant.

Examples:

1 

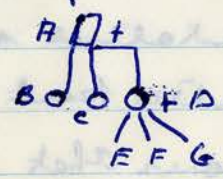
JURE PROPIO

2. 

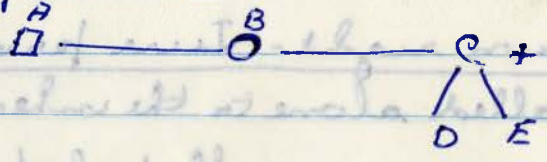
JURE PROPIO

By Representation - JURE REPRESENTATIONIS

1. When the grandfather dies and leaves one or more sons and grandchildren of a son who died before. The succession is by stirps and the grandchildren will take the place of their father



2. When a brother dies without descendants or leaves a brother and sons of another brother who died before. These nephews will inherit by representation



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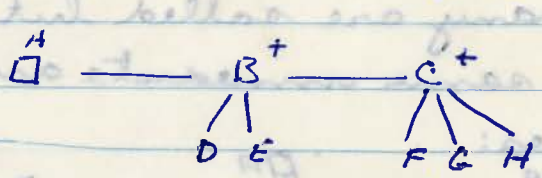


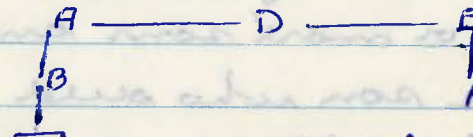
By an express provision of the Code (art. 927 if nephews concur to the inheritance by themselves without any uncle there will not be representation but all the nephews will inherit per capita.

4. Basic Principles

a) Representation only in the intestate inheritance

b. " never in the ascending line.

c. " in collateral culture of brothers



D inherits all F can not represent E

d. The representative does not inherit the one represented but the deceased

e) It is curious that the Spanish civil Code (art 925) went to the Justinian principle (Nov. 118, chapter 3) in the provision that in the collateral line only the sons

of brothers, i.e. nephews could exercise the right of representation, but not other descendants as grandsons which was the principle followed by the French (art 742) and the Italian (art. 732. Code of 1865) and art 468 of the 1942 Code)

17. Intestate Succession

When a person dies without a will his relations have a right to be his successors in his estate or inheritance according to the provisions of the law as a. Civil Code.

This type of succession is called intestate or ab intestato or legitimate succession because the source of the right to succeed comes from the statute and not from the will of an individual.

18. When does this type of succession take place?

Fundamentally when there is no will and the deceased dies intestate

However, there are other situations, some provided in a specific article of the Code, art. 912 and others not which also determine the intestate succession.

Those provided by the Code are:

a. Void will
b. There is a will but no heirs appointed to all or part of the property.
c. Condition is lacking by the appointed heir
d. The heir is disqualified

Those not provided in the code are:

a. The clause designating the heirs is void
b. Fulfillment of resolutory condition
c. Disappearance of the will
d. Incapacity to make a will
e. Institution of an heir for a term.
f. Repudiation of the inheritance.

19. Heirs - Priorities

1st. Descendants
2nd. Ascendants
3rd. Natural son
4th. Privileged-collateral - Brothers and their sons
5. Spouse
6. Other collaterals down to the sixth degree
7. The State

20. Right of Accretion

Because of the difficulty to find a clear and precise rule which would cover all cases that could come up there was a current of opinion to leave out of the Civil Code this Roman juridical institution source of many legal conflicts.

21. In Roman law the reason for the right of accretion was different in relation to heirs than in legatees. In heirs was due to the fact that if accretion would not take place, that part unassigned of the inheritance would have to go to the Intestate heirs but there was a principle that no one could die part testate and part intestate nemo pro parte testatus pro parte intestatus decedere potest.

In relation to the legatees the right took place because it was thought to be the will of the testator which is the same reason that it has nowadays regarding both the heirs and legatees.

22. Requisites of the right in the Testamentary Succession.

a. Two or more persons designated to the same inheritance or to the same portion thereof without a special designation of shares

b. That one of the persons designated dies before the testator or renounces the inheritance or is unqualified to receive it.

The constant requirement of this institution is the joint call and a vacant portion of the inheritance

23. Joint call

Very obscure in the Code art. 983.

Res tantum

Verbis

Re et Verbis tantum

Scaevola, Castan and the Dirección de los Registros y del Notariado and Supreme Court Spain have interpreted in the sense that there is a joint call when succeeded by shares without mentioning specific lineas (ner)

24. Vacant lot or part of the inheritance

The vacant part can come when:

a. The heir dies before the testator

b) Incapacity to receive it

c. Repudiation

2.5. Is the accretion right subject to charge or [illegible]

The majority of the professors (Scaevola Carta De Buen etc.) are of the opinion that in the testamentary inheritance the accretion is voluntary and in the intestate is obligatory

In the Italian and French Codes the accretion is compulsory but in Chile the heir can reject the accretion and obtain her own part in the inheritance

The Spanish Supreme Court has declared that the usufruct given to two sisters if one of them dies the other by accretion continues on her part of the usufruct.

26 Right of Transmission - Transfer

When an heir dies after the decease without having accepted or rejected the inheritance, his heirs have, by the right of transfer, the right of acquiring the inheritance. However this right, different from the representation right, has gone into the patrimony of the heir who transmitted it to his own heirs.

27. Representation and Accretion

The representation right has priority over the right of accretion

28 Substitutions

The reason for the substitution in Roman law was because the testator or designer wanted to make certain that he would not die intestate. That is why when the inheritance was not very attractive the designer named substitute a slave who was compelled to accept the inheritance.

Nowadays the reason for the substitution is to respect the will of the designer.

29 Types of substitutions.

There are two types of substitution the direct and indirect

The direct substitution is the "vulgar" in which the designer names an heir and a substitute in case the heir does not want or can not accept the inheritance

In the indirect or "fideicomisaria" substitution the first called must keep the properties inherited which will belong to the substitute when the first called dies.

Pupilar. This original substitution can only be made by the father or ascendants in relation to the son that are without having the "testamentifactio" i.e. the power to make a will. It refers not only to the

estate of the father but also of the son.

When the lawyer refers to one specific case of substitution, the others cannot presumed (i.e. like he says of Dauer before) also, other cases such as repeating the inheritance are not completed.

30. Wills in General.

Everyone can make a will with the exception of those who are not yet 14 years of age and those who are insane.

Even the insane in a period of sanity can make a will.

As any other juridical act the will made under duress or fraud is void

The will is a very personal act that cannot be done on behalf of somebody

Testamentary clauses should be interpreted in the literal meaning of the words, in case of doubt, the desire (will) of the testator must prevail.

The testator can dispose of his estate by naming heirs or legatees.

31 Types of Wills.

Ordinary { Common { Holographic / Open / Closed
Special { Military / Maritime / Foreign country

32. Revocation of Wills.

Wills are essentially revocable

Clauses annulling future provisions are considered not existent

To revoke is necessary the same formalities

33. Capacity to receive by Inheritance

Every person can receive by inheritance or succession.

To the effect human person is that born with a human form and lives twenty-four hours entirely separated from the mother's womb.

Corporations and associations not allowed by the law.

34. Specific incapacities (testamentary prohibitions)

1. Priests that have been named during the last sickness that has confessed the de-cujus (art. 752)
2. The ~~pro~~ guardian if the declaration clause has been made before the final accounts have been approved.
3. The Notary and the relatives art. 754
4. Witnesses to the will
5. Indignity (art 756)

It can be considered a forfeiture by the de cujus

35. Antinomy of Articles 759 + 799 of the Civil Code

36. Forced Heirs. (Herederos Forzosos)

Everyone who has descendants, ascendants a wife or husband is compelled by law to leave a certain portion of his state to them.

Natural descendants and wife are always forced heirs no matter with whom they come to inherit and their portions vary according with whom they are called

Ascendants are only forced heirs when there are no legitimate children.

37. Legitimate portions.

The estate or inheritance is divided in three portions called: short third forced portion; long 1/3 forced portion, and the last third can be willed or bequeathed by the deceased.

Descendants always have a right to 2/3 of the inheritance and ascendants to 1/2 of it.

The third of betterment (mejora) can only be distributed among the descendants

38. Legitimate rights of the widower-

no problem when she comes to the inheritance with only one child. She receives a third ⅓ in usufruct

The problem arises when she comes to the inheritance with more than one child.

The reason for the problem is the phrase of article 834 which states: "shall have a portion in usufruct equal to that corresponding by way of legal portion to each of the legitimate ~~portion~~ children or descendants who have not received any betterment"

This phrase has cause 6 different interpretations of interpretation

The most accepted theory is the one called "changeable (variable) medium quoted - (Dividendo medio variable). This theory is focused on each case which is the amount that corresponds to the "long forced portion" i.e. the ⅔ of the inheritance.

Example 120.000 left to the 2 sons. The long legitimate portion of each son is 40.000

so the widow will receive $40,000 in usufruct.

De Buen, el conyuge viudo mas que un derecho a ser incluido hereda lo que tiene en el derecho a una cuota.

39. ~~Legitimate (forced rights) of the illegitimate children only recognized.~~

The "natural" children have a right to receive ½ the portion in ownership of that which has the legitimate children who has no betterment (mejora)

The theory mostly accepted is the same as the one accepted for the widow, i.g. dividends made variable In a case of 120,000 the natural son that goes with 2 legitimate sons receive

40. Preterition - Art. 814

In Roman Law at the beginning the father could dispose of his inheritance as he saw fit. The XII tables had a provision that said "Ui legasit pater familias super pecunia tutelave sua rei it jus esto" all that the father disposes about his estate is the law"

From that complete freedom to dispose by will, when the customs changed, appeared the formal reserve succession. The decujus had to mention some of his relations. It was required only to mention them, otherwise the will was void.

From the above, in a later period of Roman law, it was required to name heir the forced heirs. The same idea went into the Ley de Partidas but the Civil Code later only needed that the forced heir receives something to avoid preterition.

Practical reason to determine wether is a preterition or a disinheritance.

41. Disinheritance

Arts. 853 (756 and) specifies the different causes by which the testator can disinherit his forced heir.

The testator can forgive

Some are of the opinion that disinheritance can not be conditioned there no

The majority of the doctrine does not accept a partial disinheritance.

40. Bequests

Definition. A bequest is a testamentary disposition under a singular title by which the testator leaves one or more specific things to one or more persons called legatees, to be delivered to them by his heirs or executors of the inheritance after his death.

There is no question that it is a testamentary disposition.

It has a tendency to be a liberality. Letters

It is a singular succession and not "universal".

When the bequest prejudices the forced portion (legitime) the bequest is reduced

The French Code wanted to avoid the confusion between legatee and heir and with art. 1002 established that testamentary dispositions are "universelle, à titre universel ou à titre particulier.

The universal legataries had the "saisine" in some cases and therefore had the effect of ultra vires hereditis

There are three person involved in the bequests: The testator (the will), the heir and the legatee.

41 Types of Legacies: See classification

42 Revocation - Tacit Revocation

There are some doubtful cases - The diamond and the diadem.

The land and building.

43. Acceptance of the Inheritance

1. Cannot be subject to condition or term
2. Irrevocability
3. Can not be and then not be - Semel heres semper eres
4. At the right time.
5. Art. 1006
6. Expressly or tacitly

44. Benefit of Inventory

Rome at the beginning only knew the pure and simple acceptance which had the confusion of patrimonies or ultra vires hereditatis.

Emperor Gratiano established the benefice of inventory for military men

and Justinian extended it to everyone.

Requisites

1. Solemn acceptance in this manner.
2. Inventory

The heir who accepts under the inventory benefit not only does not have to pay the debts of the inheritance but also keeps his own rights against it.

The benefit is lost:

1. If the heir out on purpose some possessions of the inheritance
2. If the heir sells possession of the inheritance without authorization of the court.

45. Executors (Albaceas)

1. Very personal
2. Non assignable (transferable)
3. Temporary
4. Gratuitous
5. Testamentary
6. Voluntary

Types of Executors { Testamentary { legitimate / Datives
{ Universal / Particular
Mancomunado (jointly) / Successive / Solidarily

General Powers of the Executor

1. Put in effect the good wishes of the testator (suffragios)
2. Pay the money legacies or bequests
3. Watch to comply with the wishes of the testator
4. Take the necessary precautions to preserve and custody of the possessions of the inheritance

As soon as the heirs are in agreement on the administration of the inheritance the executor (albacea) ceases.

Libros y Publicaciones que hay que Adquirir

Sutteridge - Comparative Law, An Introduction to the Comparative Method of Legal Study and Research - Cambridge University Press 2nd Ed. 1949

Paumier - Introduction au Droit comparé These, Rennes 1902.

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Rubinstein (Ronald): Iniciación al Derecho Inglés Edit. Bosch, Barcelona, 1956 - Traducción de Jardi de John Citizen and the Law.

Castán Tobeñas - J. Evolución Jurídica y Progreso Jurídico.

Frank. La influencia del Derecho Europeo Continental en el Common Law, Barcelona, Bosch 1957

Jenks - (Edward) Jenks, The history of doctrine of consideration in English law, London Clay and Sons, 1892

Schlesinger. Comparative Law, Cases and Materials Bucklyn 1950.

Frases y Pensamientos sobre el Derecho Comparado

1.- "Presenciamos actualmente en España una saludable reacción, en sentido universalista, respecto a los estudios jurídicos. Durante un período ya centenario, venimos influenciándonos por corrientes continentales, y hoy se rompe ese cerco para, con un espíritu amplio, aprovechar todas las corrientes jurídicas que puedan de alguna manera perfeccionar nuestro sistema jurídico. La reacción nos viene a través del estudio del Derecho Comparado que comienza a romper los diques de contención y aislacionismo continental." B. Diferman. Rev. Gen. Leg. Jur. T. XXXIV (202) P. 462.

2.- M. Sarfatti - "El Derecho Comparado como disciplina autónoma es "aquella ciencia que provee un continuo acercamiento entre las legislaciones sujetas a comparación y extrae de su aparente diversidad el fondo común de las instituciones y de los conceptos que en ellas existe latente, recogiendo así un conjunto de principios comunes que permita, como una lejana perspectiva, la consiguiente unificación del Derecho. (Introducción al estudio del Derecho Comparado, trad. del Inst. de Der. Comp. Mexico 1945 P. 70, Ai-

tado por Cortán. Rev. Gen. de Leg. y Jur. T. XXXVII P. 303.

2 Gutteridge. El Derecho Comparado (Introducción al estudio de los Derechos extranjeros y al método comparativo) Trad.

3 Gutteridge. El Derecho Comparado (Introducción al método comparativo en la investigación y en el estudio del Derecho) trad. de Jardí, Barcelona. Instituto de Derecho Comparado, 1954, P. 232. "las causas en que se basa la aspiración hacia la uniformidad del Derecho son, principalmente, aunque no únicamente de carácter económico. Es evidente que la diversidad jurídica es un factor de perturbación en el comercio internacional."

Un Chapitre de l'histoire des contrats en Droit Anglais A. Esmein - Nouvelle Revue Historique de Droit Francais et Étranger. T. 1893 P. 554.-

Ideas de este Artículo

1.- Le droit anglais s'est formé des mêmes éléments que le notre (Francais) quoique combinés dans des proportions différentes le droit germanique, les coutumes normandes, le droit canonique et le droit romain, en sont les éléments constitutifs

2.- El "deed" "specialty", contratos sellados sirven a la vez para trasmitir el dominio y como modo general de contratar.

3.- Otro contrato de multiples aplicaciones es una especie de contrato real similar a la "res praestita" de la ley Solica, que supone que el deudor retiene o ha recibido la propiedad mueble del acreedor y da lugar a las acciones de "debt y de "detinue"

4.- En el derecho Ingles la fuerza obligatoria del consentimiento tiene que producirse en forma que la promesa tenga por contra-partida una ventaja traducible en dinero para el prometente o un detrimento para-

mismo señalado por el estipulante que tenga una relación directa con la promesa

5.- En cuanto que el sistema contractual del derecho inglés tiene por fundamento desde antiguo el "deed" o contrato formalista, como el sistema contractual del derecho romano pervivió a la stipulation.

Librerías en la América Latina

Argentina

1. Librería del Colegio S. A.
   Alsina y Bolívar. Buenos Aires

El Prof. Elyme mandó un catálogo Ariel y Calibán a través de esta librería.